

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE***

Rule 804. Hearsay Exceptions; Declarant Unavailable

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(b) Hearsay exceptions. – The following are not
excluded by the hearsay rule if the declarant is
unavailable as a witness:

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(3) Statement against interest. – A statement

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~~which~~ that was at the time of its making so

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far contrary to the declarant's pecuniary or

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proprietary interest, or so far tended to subject

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the declarant to civil or criminal liability, or to

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render invalid a claim by the declarant against

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another, that a reasonable person in the

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declarant's position would not have made the

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statement unless believing it to be true. But a

* Matter to be added is underlined; matter to be omitted is lined through.

15 A statement tending to expose the declarant to
16 criminal liability ~~and offered to exculpate the~~
17 accused is ~~not~~ admissible ~~unless~~ under this
18 subdivision in the following circumstances

19 only: (A) if offered in a civil case or to
20 exculpate an accused in a criminal case, it is
21 supported by corroborating circumstances that
22 clearly indicate ~~the~~ its trustworthiness, or of
23 ~~the statement~~ (B) if offered to inculcate an
24 accused, it is supported by particularized
25 guarantees of trustworthiness.

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COMMITTEE NOTE

The Rule has been amended in two respects:

1) To require a showing of corroborating circumstances when a declaration against penal interest is offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534, 541 (7th Cir. 1999) (requiring a showing of corroborating circumstances for a declaration against penal interest offered in a civil case).

2) To confirm the requirement that the prosecution provide a showing of “particularized guarantees of trustworthiness” when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia*, 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not “firmly-rooted” and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear “particularized guarantees of trustworthiness” to be admissible under the Confrontation Clause).

The “particularized guarantees” requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant’s penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be “squarely self-inculpatory” to be admissible under Rule 804(b)(3)). “Particularized guarantees” therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The “against penal interest” factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia*, 527 U.S. at 138 (fact that statement may have been disserving to the declarant’s interest does not establish particularized guarantees of trustworthiness because it “merely restates the fact that portions of his statements were technically against penal interest”).

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999)):

- (1) the timing and circumstances under which the statement was made;
- (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
- (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
- (4) the party or parties to whom the statement was made;
- (5) the relationship between the declarant and the opponent of the evidence; and
- (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.